

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

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: Civil Action
: No. 3:09CV620
:
: August 17, 2010
:

COMPLETE TRANSCRIPT OF CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES: (All via telephone)

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18 Counsel for the defendant Lawson Software

19 ALSO PRESENT:

20 Leslie Wagner, Law Clerk

21

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1 (The proceedings in this matter commenced at
2 2:15 p.m.)

3
4 THE COURT: Hello. This is ePlus against
5 Lawson. And who is here for whom, please?

6 MR. MERRITT: Craig Merritt and Henry Willett
7 for ePlus.

8 MR. ROBERTSON: Scott Robertson. And with me
9 are my partners, Ms. Albert and Mr. Strapp for ePlus.

10 MR. CARR: Dabney Carr for Lawson Software.

11 MR. McDONALD: Dan McDonald, Will Schultz and
12 Kirstin Stoll-DeBell for Lawson.

13 THE COURT: All right.

14 I apologize for having to change the schedule
15 on you. And now that you've looked at these various
16 issues and tried to work up your final pretrial order,
17 how much do we have to go over in the final pretrial
18 conference? I'm looking at how long it will take.

19 MR. ROBERTSON: Your Honor, this is
20 Mr. Robertson. Maybe I can address that, and then I
21 might pass the baton to my partners who have been
22 dealing with and working with Lawson's counsel
23 probably from the beginning of last week, Your Honor.

24 I think we've been making discussions on a
25 daily basis. I think those discussions have gone

1 well. I think we've worked diligently together to try
2 to narrow the issues. We have a very solid working
3 draft that I think we'll be able to present to the
4 Court probably I would anticipate by Thursday of this
5 week, but don't want to speak out of turn. I'll let
6 others, including Lawson, weigh in on that.

7 We've narrowed a number of the issues with
8 respect to witnesses who will be appearing live so can
9 avoid deposition designations and the attendant
10 objections that go with those designations, and take
11 those off the Court's plate.

12 There's a very narrow number of witnesses now
13 that would need to be designated. We're working hard
14 to try and resolve exhibit objections and focus those
15 into groups so that the Court can deal with it. So
16 let me cut to the chase.

17 You know, I don't envision, but I'll be happy
18 to let everybody weigh in, that this would not last
19 more than two hours would be my projection. But
20 people who have been closer to it, including
21 Mr. Schultz and Ms. Kirstin Stoll-DeBell, Ms. Albert
22 and Mr. Strapp, who actually were on the phone today
23 from about noon to 1:30, Your Honor, trying to narrow
24 and resolve a lot of these issues.

25 THE COURT: All right.

1 Who is going to comment?

2 MR. McDONALD: This is McDonald for Lawson.

3 Does anybody else from ePlus want to add to
4 what Scott just said? I'll let you do that before we
5 respond.

6 MS. ALBERT: I think Scott's characterization
7 is fair concerning the efforts we've made to narrow
8 the scope of the issues for the pretrial conference.

9 THE COURT: Who was that?

10 MR. ROBERTSON: This is Mr. Robertson again.
11 We're not without our disputes, and we want to focus
12 those, and we will be raising them. In fact, we may
13 be filing a motion with regard to Lawson's damages
14 expert, Mr. Green, tomorrow, which we narrowed with
15 Lawson today. So there are still points of
16 disagreement, but we are working diligently to
17 minimize those.

18 THE COURT: Who was the lady who spoke
19 earlier?

20 MS. ALBERT: I'm sorry. That was Ms. Albert
21 for ePlus.

22 THE COURT: All right. You said he was
23 correct respecting the efforts that had been made, but
24 you didn't say anything about the results of the
25 efforts. Do you concur?

1 MS. ALBERT: Well, I'll defer to Lawson's
2 counsel, but I think that it is correct that we have
3 been working on it on almost a daily basis to narrow
4 the scope of the issues. We have narrowed the number
5 of objections on exhibits, and we're continuing to
6 work on exhibits, and we have narrowed the scope of
7 the issues regarding the deposition designation issues
8 that need to be discussed, and we are close to getting
9 a draft of the pretrial order ready for filing.

10 MR. McDONALD: Your Honor, this is McDonald
11 for Lawson if you'd like to hear my reaction to that.

12 THE COURT: Sure.

13 MR. McDONALD: I'm pretty much in agreement
14 with everything that's been said so far. I'll defer
15 to Mr. Schultz or Ms. Stoll-DeBell to add anything,
16 but I think the deposition designations issue is a
17 perfect example. There were all sorts of objections
18 and cross-designation objections line by line, but
19 we've reached some agreements on live testimony that's
20 going to eliminate needing to read in the vast
21 majority of those depositions.

22 So I do think the bottom line is we have
23 narrowed the issues. There are some issues, but I
24 think even though they may affect a large number of
25 exhibits, for example, we are going to be able to

1 group them into a relatively small number of issues.
2 I think two hours is probably a little ambitious. I
3 would say it's more likely three hours or maybe a
4 little over that, but I think that's the ball park.

5 THE COURT: All right.

6 That being the case, I can do that on August
7 31 or September 7. What does that do other than bring
8 silence to the table?

9 MR. ROBERTSON: Your Honor, this is
10 Mr. Robertson.

11 August 31, I think, would be preferable to
12 us. There are a few issues that I would like to bring
13 to the Court's attention before we get to the
14 pretrial.

15 As I indicated, we contemplate filing a
16 motion tomorrow with respect to Lawson's damages
17 expert Mr. Green.

18 THE COURT: What motion is that, did you say?

19 MR. ROBERTSON: Well, Your Honor, I think
20 it's a motion to strike Dr. Green's testimony as
21 Lawson's damages expert given Your Honor's previous
22 ruling as to the underlying factual predicate that he
23 relies upon for his opinions. And we've had an
24 opportunity to reflect on that. We've had an
25 opportunity to reflect on the Court's ruling with

1 respect to Dr. Mangum.

2 We understand and appreciate the Court
3 understands and appreciates that we respectfully
4 disagree, but it is what it is, and given that, we'd
5 like to raise this issues with the Court earlier
6 rather than later so that the Court has it in front of
7 it.

8 There are some other issues.

9 THE COURT: So wait a minute. Excuse me.
10 You're filing a motion on Dr. Green's testimony
11 tomorrow, you say?

12 MR. ROBERTSON: Yes, sir.

13 THE COURT: And when are you going to expect
14 a reply? It's now the 17th of August.

15 MR. ROBERTSON: I would think before the
16 31st we'd have a reply.

17 THE COURT: Well, the 18th, you're going to
18 file tomorrow. You're going to file it on the 18th.
19 They're going to have a period for response, and then
20 you're going to need to reply, I guess, and the
21 standard timeframes under the local rules for
22 responses and replies does not allow for that to be
23 heard by August 31. So let's think about that and
24 table that issue.

25 MR. ROBERTSON: Perhaps we can agree on an

1 expedited schedule. I just wanted to get it out
2 there.

3 THE COURT: I understand. I said let's table
4 it and we'll come back to it.

5 What else did you want to raise so we'll all
6 know what we're talking about?

7 MR. ROBERTSON: Fair enough, Your Honor.

8 Your Honor may recall you permitted Lawson to
9 identify two additional expert witnesses.

10 THE COURT: Yes.

11 MR. ROBERTSON: They have now identified
12 those, and they have represented to us, although I
13 want to make sure I'm correct on this, that they're
14 going to submit reports on August 25, and we get an
15 opportunity to depose them sometime after that, which
16 would probably be the week of August 30.

17 We're concerned about those because during
18 our discussions with Lawson on these meet and confers,
19 for example, they represented to us that the source
20 code expert will be addressing Lawson's 7.0 source
21 code.

22 Now, Your Honor will recall that you ruled
23 that the 5.0 version and the 6.0 version was off the
24 table with respect to almost every issue including
25 demonstrations, arguments concerning non-infringing

1 alternatives and lack of willfulness.

2 Apparently, now Lawson's position is that 7.0
3 is now on the table because the Court's ruling wasn't
4 specific as to that, but only 5.0 and 6.0. And so the
5 same arguments are being raised as part of
6 non-infringing alternatives, lack of willfulness, etc.

7 THE COURT: Was 7.0 ever on the table? I
8 don't remember it, but I've got a lot of cases, and I
9 could be wrong.

10 MR. ROBERTSON: It's our position that it was
11 not, Your Honor.

12 THE COURT: Then I'm sure I'll get a proper
13 motion from you when you get a reply.

14 MR. ROBERTSON: Exactly. Your Honor was
15 asking what issues are on the table. That's another
16 issue.

17 THE COURT: All right. What else? Anything
18 else?

19 MR. ROBERTSON: Yes, sir. There's a newly
20 identified invalidity expert. He was one of Lawson's
21 fact witnesses before. Now he's been designated as an
22 expert. There's a couple issues we're going to raise
23 with regard to that.

24 No. 1 is it's going to be difficult and
25 confusing to the jury to understand when he's wearing

1 his fact witness hat and when he puts on his expert
2 witness hat, but there are ways to deal with that, and
3 we'll be happy to make proposals to the Court as to
4 when he can be an expert or when he's just testifying
5 in his percipient factual witness capacity.

6 The second issue is that it's been
7 represented to us that he will be raising theories
8 that go outside of the scope of what Your Honor has
9 ruled is the four corners of the invalidity theories
10 that the witnesses can present.

11 I thought we addressed that issue last
12 Thursday. Ms. Stoll-DeBell wasn't on that call. That
13 was the call regarding Dr. Mangum. I raised this
14 issue again on the call. The Court indicated that
15 there would not be any new theories on invalidity
16 rulings. There was a ruling, but we're a little
17 confused.

18 THE COURT: I was sure on the last call and
19 I'm sure now that there will be no expert testimony on
20 invalidity theories that weren't disclosed pursuant to
21 the orders. That issue has previously been briefed
22 and decided. I'm not going to revisit that issue. If
23 I was wrong, I was wrong, but that's going to be the
24 rule, and I'm sure Lawson will abide by it, won't you,
25 Ms. Stoll-DeBell?

1 MS. STOLL-DeBELL: Yes, Your Honor.

2 THE COURT: And if you don't, if your toe is
3 off base, your expert's foot is off base, the hatchet
4 will come down upon it, and your expert will go out
5 the door.

6 Now, that's what happens here if you-all
7 start transcending the rulings that have been
8 previously made defining the boundaries. So I know
9 they won't do that. So we don't have that problem
10 now, and we'll just abide the event.

11 Next? Anything else? That's it, isn't it?

12 MR. ROBERTSON: No. The last issue, sir, and
13 this is, you know, in anticipation of filing this
14 motion tomorrow with respect to Dr. Green.

15 One of the issues, you'll recall, was a
16 discussion about whether the depositions of the
17 damages experts actually were part of -- part and
18 parcel of the disclosure under Rule 26 of the Federal
19 Rules of Civil Procedure.

20 And I understood and appreciated that Mr.
21 McDonald confirmed that that arrangement was agreed
22 upon.

23 Dr. Mangum did opine on Dr. Green's opinions
24 in his deposition and rebuttal. His only opportunity
25 to do so.

1 We understand the Court's ruling with respect
2 to Dr. Mangum's affirmative opinions, and we're not
3 questioning that, but we would respectfully suggest
4 that Dr. Mangum still have an opportunity, to the
5 extent that Dr. Green is permitted to testify after
6 the Court reviews the briefing, to be able to take the
7 witness stand and respond to any opinions offered by
8 Dr. Green.

9 That'll be part of the briefing. I just
10 wanted to bring it to the Court's attention now so
11 that there were no surprises later on.

12 THE COURT: I'm sure you don't want to go out
13 with one foot missing either. And you will go out if
14 you start trying to do the same things.

15 Counsel and the experts just are going to hit
16 the road if you try to infringe upon the previous
17 rulings. To the extent that they don't do that, you
18 don't take that course, I'll just have to deal with it
19 as it's presented to me.

20 MR. ROBERTSON: I have one last final issue,
21 Your Honor, if you might indulge me. I'll be brief.

22 THE COURT: You already had the final issue.

23 MR. ROBERTSON: All right. I just wanted to
24 apprize the Court, but we can raise it at the
25 pretrial, sir.

1 THE COURT: But you just said there's one
2 last issue.

3 MR. ROBERTSON: Well, it's related, sir, to
4 the damages issue.

5 THE COURT: Oh, okay. What is it?

6 MR. ROBERTSON: That is we don't have a
7 damages expert, but we respectfully suggest we still
8 have a damages case, and we are going to have to prove
9 that through facts that we're going to put in front of
10 the jury as to accused revenue that we have derived
11 from interrogatory answers, document productions, and
12 corporate Rule 30(b)(6) designated testimony.

13 And the statute states outright that district
14 court shall not grant anything less than a reasonable
15 royalty as part of damages.

16 So while I understand I will not have
17 Dr. Mangum to offer opinions with respect to that, I
18 will be offering factual testimony that supports a
19 damages award that we think is appropriate at the end
20 of the case.

21 I just wanted to get that out front so that
22 there were no surprises. This is not an effort to any
23 kind of end around the Court's ruling. I understand
24 the Court's ruling, but the statute says I still have
25 a damages case, and to the extent we can put that on

1 through factual evidence, Your Honor, I want you to be
2 aware that we're going to be making that effort, sir.

3 THE COURT: It never crossed my mind that you
4 wouldn't. I didn't rule anything about your proofs
5 other than the expert. That was the only issue in
6 front of me.

7 MR. ROBERTSON: That's good, sir. Thank you.

8 THE COURT: I haven't ruled that you can't
9 put on a damages case. How you're going to do it is a
10 different issue. And if you try to get in Mangum's
11 opinions in some way indirectly that you couldn't get
12 in directly, you're going to run into a big problems.

13 So I imagine that your damage case is going
14 to take a different configuration than Mangum's
15 opinions, you being a savvy lawyer, so I'll wait and
16 see what they are.

17 MR. ROBERTSON: Yes, sir. Thank you.

18 THE COURT: All right. Is there anything
19 special that you-all need to raise from Lawson?

20 MR. McDONALD: Your Honor, this is McDonald
21 speaking again.

22 Just on the damages issue, we have taken a
23 look, and I think the Court raised this when we had
24 the hearing in person there about what could ePlus do
25 if their expert on damages was not allowed to testify.

1 We have taken a close look at all of their pretrial
2 disclosures relating to damages, their interrogatory
3 answers regarding damages, their initial and
4 supplemental disclosures under Rule 26.

5 They have nothing else that they have ever
6 disclosed to support damages other than the Mangum
7 report. And we have found case law that we think
8 makes it pretty clear that they don't have any
9 evidence of the amount of damages. So they're not
10 going to be able to prove an amount of damages, not
11 withstanding that statute that says you can get a
12 royalty as your minimum damages.

13 The fact is the amount is not going to be
14 able to be proven. So I do think it makes sense to
15 get some briefing in front of the Court on that,
16 whether ePlus files a motion and we respond to it.
17 I'm not sure what their motion was going to actually
18 be, but that is, I think, the biggest issue we're
19 looking at right now.

20 As you heard, I don't think we really have an
21 issue for either report. We understand that the Court
22 gave us permission to have two experts that had a very
23 focused topic to respond to each of these two extra
24 ePlus experts; one on the source code, and then one on
25 the 102 and 103 related prior art invalidity issues.

1 We're being meticulous in our focus in
2 dealing with just those topics for each of those two
3 experts and nothing more.

4 But, again, I guess that will be briefed
5 along the course here and flushed out once ePlus gets
6 a chance to actually see these reports, which have not
7 been completed yet. So it's a little premature to
8 talk about those in any detail right now.

9 THE COURT: Well, I don't see how all this
10 can get briefed and the depositions get had and have
11 the final pretrial conference on August the 31st.
12 Maybe I'm being unrealistic, but I don't see how that
13 can happen. So I suggest we do this on September the
14 7th.

15 MR. McDONALD: That works for Lawson, Your
16 Honor.

17 MR. ROBERTSON: That works for ePlus, Your
18 Honor.

19 THE COURT: I don't see any alternative given
20 what you're doing now. I think we need to, however,
21 define the basic topics by using some short form
22 reference that will be appropriate to recite in a
23 scheduling order and have you agree on a briefing
24 schedule on these matters.

25 Lawson's brief on Dr. Green is coming

1 tomorrow; is that right?

2 MR. ROBERTSON: It's Mr. Robertson, Your
3 Honor. And it's ePlus's brief on Dr. Green that will
4 be filed tomorrow.

5 THE COURT: All right.

6 And then you want to file your response on
7 the 24th of August, Mr. McDonald?

8 MR. McDONALD: Yes, Your Honor, that's fine.

9 THE COURT: Then you're going to be taken
10 your -- I mean, your expert reports are coming when?
11 The 25th?

12 MR. McDONALD: The 25th.

13 THE COURT: August 25th. That's your source
14 code and invalidity expert; is that right?

15 MR. McDONALD: That is correct, Your Honor.

16 THE COURT: To rebut the points that were
17 made by the experts they were allowed.

18 All right. And then what other motions are
19 we talking about here? You said, Mr. McDonald, you
20 have a motion about their damages case, but you don't
21 really know what their damages case is at this point,
22 as I understood it. Am I correct in that assessment?

23 MR. McDONALD: Yes, but if it's anything more
24 than zero, basically, we know we have an issue.

25 THE COURT: Well, I know we have an issue,

1 and I think they contemplate something more than zero.
2 So it seems to me that maybe -- Mr. Robertson, do you
3 know what you're going to put on in the way of
4 evidence sufficient to inform them about it so we can
5 get the issue framed?

6 MR. ROBERTSON: Yes, sir.

7 THE COURT: Do you know that now is what I'm
8 trying to ask you?

9 MR. ROBERTSON: I have a very solid idea of
10 what it is, Your Honor. If I can make a suggestion,
11 and that is we think a lot of these facts are coming
12 out. Quite frankly, we think we've obtained a lot of
13 these facts from their own witnesses' mouths. So this
14 isn't a surprise to them.

15 We know profit margins. We know the accused
16 revenues. We know a lot of the things that go into
17 the Georgia-Pacific factors that the Court is going to
18 instruct the jury on.

19 Once we put that evidence in that support the
20 Georgia-Pacific factors, it's a matter of arguing what
21 a reasonable royalty rate should be and what the
22 royalty base should be. Those are just facts, Your
23 Honor, and we can argue from that.

24 Will that form substantial evidence? We
25 think so. My suggestion would be the appropriate time

1 to raise this issue would be on a JMOL at the end of
2 the plaintiff's case after we establish what we think
3 are the underlying facts, whether they be from our own
4 witnesses who provided deposition testimony or
5 Lawson's witnesses, who have given deposition
6 testimony pursuant to Rule 30(b)(6) that binds them.

7 That would be the, I think, suggested way to
8 handle this rather than to try and brief to you all
9 the issues at this point.

10 MR. McDONALD: Your Honor, this is McDonald
11 speaking again for Lawson.

12 If that's Mr. Robertson's position, then it
13 seems to me that maybe we are the ones that need to
14 file the motion then to exclude any damages theories
15 that ePlus may now propose now that their damages
16 expert is out because they did not disclose any other
17 theories.

18 And whatever evidence may come in about the
19 fact that Lawson has made sales or whatever is one
20 issue. But if I understand Mr. Robertson right is he
21 wants to get in front of the jury and say, We're
22 entitled to damages in a certain amount or range of
23 amounts, and here's why we think we're entitled to
24 that. That's a new damages theory, whatever it is,
25 but has never been disclosed properly and should be

1 excluded. So I do think that we will need a motion on
2 that.

3 MR. ROBERTSON: This is Mr. Robertson if I
4 might briefly respond.

5 Your Honor, you have been through many a
6 trial. Facts are facts. In fact, facts are often
7 stubborn facts. And the facts are the Georgia-Pacific
8 factors are given to the jury as an instruction. And
9 they, under the statute, need to arrive at a
10 reasonable royalty rate. Fact issue. And they can
11 look at the facts that have come out in this case
12 either from Lawson witnesses or our own.

13 We didn't need to articulate it through a
14 damages expert. He relied on certain agreements the
15 Court's excluded as far as reliance on those. We
16 understand that. But there are facts as to what their
17 profit margins are. There are facts as far as
18 competition goes between the parties.

19 What happens in the first case before you
20 ever had a license agreement, before you had anything,
21 it still goes to the jury to determine what a
22 reasonable royalty is even if you don't have any prior
23 licenses to rely upon. That's just what the statute
24 says.

25 And we're just asking, and I can provide the

1 Court with some case law on this if the Court wants a
2 bench brief or whatever. I just would ask the Court
3 not to prejudge it until the Court hears what the
4 facts are that are going to be coming out.

5 Once the facts come out, like any factual
6 issue, you can argue it to the jury as to whether
7 infringement exists or damages exist and what amount
8 is appropriate.

9 I'm sure the Court will be mindful, and I'm
10 going to be very mindful that I'm not going to be
11 trying to backdoor any of Dr. Mangum's opinions that
12 the Court has said are not admitted. But there are
13 other underlying facts. There are 15 factors that the
14 jury must consider that will warrant a reasonable
15 royalty rate as the statute says the Court must
16 assess.

17 THE COURT: Well, the statute doesn't say
18 that. The statute doesn't address the admissibility
19 of evidence that's necessary to prove the royalty.
20 The presupposition of the statute is that you shall
21 award no less than a reasonable royalty if a
22 reasonable royalty is proved.

23 So that's really I don't think the issue at
24 all. I don't think the statute is the answer to the
25 question posed completely, but it's relevant.

1 What I understand Mr. McDonald to be saying
2 is that you didn't make any of these damages about
3 which you're speaking now by way of a Rule
4 26(a)(1)(A)(iii) disclosure or by way of any
5 supplemental disclosures pursuant to the obligations
6 that are imposed for supplementary disclosures under
7 26(e), which says that a party who has made a
8 disclosure under 26(a), among other things, must
9 supplement or correct its disclosure or response, (a)
10 in a timely manner if the party learns that in some
11 material respect the disclosure or response is
12 incomplete or incorrect, and if the additional or
13 corrective information has not otherwise been made
14 known to the other parties during the discovery
15 process or in writing or as ordered by the Court.

16 And whether or not you have is not something
17 that I'm prepared to deal with. In addition, I hear
18 him saying that they have reviewed interrogatory
19 answers on damages, and you haven't made any
20 appropriate answers to discovery, which would forecast
21 what you're doing by way of damages. And I'll just
22 have to deal with that when it comes up.

23 If you wanted to file a motion, when do you
24 want to file it, Mr. McDonald?

25 MR. McDONALD: I'd like to file that by

1 Friday of this week, Your Honor.

2 THE COURT: And that date is?

3 MR. McDONALD: August 20th.

4 THE COURT: The 20th. File that on the 20th.

5 Mr. Robertson, you file your response to that
6 on the 27th and your reply on the 31st.

7 Did we get a reply scheduled on the other
8 one? That would be on the 31st, too, then wouldn't
9 it?

10 MS. WAGNER: The response is coming on the
11 24th.

12 THE COURT: So the reply would be the 27th,
13 right?

14 MS. WAGNER: Yes.

15 THE COURT: All right. To the ePlus motion.
16 The original date is what, Ms. Wagner?

17 MS. WAGNER: The 18th.

18 THE COURT: The 18th. Then the response
19 brief is the 24th. And the reply brief to the ePlus
20 motion is the 27th.

21 Now we've got also any motion that Lawson
22 plans to file is to be filed on the dates we have just
23 set, and that will be in an order. And I'll just deal
24 with whatever I'm presented with at the time.

25 Anything else that you have, Mr. McDonald,

1 that you wish to raise?

2 MR. McDONALD: No, I don't believe so, Your
3 Honor. I'll ask Ms. Stoll-DeBell if she has anything
4 to add.

5 MS. STOLL-DeBELL: Not at this time, Your
6 Honor.

7 THE COURT: Okay. All right.

8 Then our pretrial conference will begin at
9 9:30 in the morning on September the 7th.

10 Now, as to depositions, I've given previous
11 instructions in a case in which Mr. Willett -- are you
12 still there, Mr. Willett?

13 MR. WILLETT: I am, Your Honor.

14 THE COURT: -- is involved about how to show
15 me the objections that remain after you finish, the
16 objections to the discovery designations.

17 And, in essence, you take the pages of the
18 deposition that you're going to use. You put them
19 together. And you highlight the part of the
20 deposition that you're objecting to. One of you take
21 one color and the other one take another, not using
22 blue or green highlighters. And in the margin,
23 annotate the basis for the objection by rule number.
24 And then I'll hear you on it.

25 I gather I'm not going to have a lot of that

1 anyway. The same basic approach will obtain as to any
2 other discovery material that you intend to offer into
3 evidence.

4 And I expect that I will have a lot less by
5 way of testimony to read than the 6- to 8-inch binder
6 that somebody delivered over here the other day. And
7 whoever delivered those 6- to 8-inch binders is
8 welcome to come get them in view of what you all have
9 said today so that you don't unnecessarily corner the
10 binder market or kill all the forests that are left.

11 Ms. Wagner, I don't know whose those were, do
12 you know? Both sides?

13 MS. WAGNER: I think they are ePlus's.

14 THE COURT: I think they were ePlus's, but
15 I'm not sure.

16 Anyway, you know what to do, Mr. Willett,
17 right?

18 MR. WILLETT: Judge, a point of clarification
19 because actually after this I'm getting on a call in
20 that other matter, and I want to make sure that
21 everyone is on the same page.

22 The party who is objecting to the deposition
23 designation will, in essence, print off that page,
24 bracket the testimony in question, and then in the
25 margin state their objection using the appropriate

1 federal rule of evidence number.

2 THE COURT: Wait a minute. No, wait. Let me
3 go back.

4 You print off the page. You take a black pen
5 or a marker and you bracket on the right-hand or
6 left-hand margin, probably the right-hand, the
7 testimony from that page that I am to consider.

8 MR. WILLETT: Got you.

9 THE COURT: And if somebody then has an
10 objection to a particular question or answer, you take
11 a yellow highlighter. Suppose you started on page 25,
12 line 3, and end on page 25, line 18, and the objection
13 is at line 13 through 17, and the answer then is the
14 rest of the page. Then you're going to highlight
15 that. And in the margin, you're going to annotate
16 Rule 401, Rule 402, relevance, hearsay, authenticity,
17 etc. And use the rule number and a brief
18 identification like authenticity or relevance just so
19 I know what you're talking about quickly. Then I'll
20 be able to understand what you're doing.

21 So the plaintiffs use yellow and the
22 defendants use pink. Sometimes it comes up that
23 objections are on the same page, particularly where
24 you're looking at fairness issues under Rule 32.

25 Does that help you out, Mr. Willett?

1 MR. WILLETT: It does, Your Honor. Thank
2 you.

3 THE COURT: Okay. All right.

4 I don't expect to see a lot of deposition
5 testimony now based on what you said. And I think the
6 jury will appreciate that.

7 MR. ROBERTSON: Your Honor, this is
8 Mr. Robertson. If I can raise one final issue I think
9 will be beneficial to both parties and the Court.

10 THE COURT: Go right ahead.

11 MR. ROBERTSON: I had said early on that we
12 were contemplating filing the final pretrial order on
13 Thursday of this week, the 19th.

14 Given the Court's schedule and now moving the
15 pretrial to the 7th, I think it would behoove all the
16 parties if we were able to continue the
17 meet-and-confer, try to narrow the issues further to
18 limit the issues for the final pretrial. And so I
19 might make a suggestion, although I'm open to Mr.
20 McDonald and to you on this, that we would instead of
21 filing the final pretrial order on the 19th, file it
22 on the 25th or perhaps the 26th, still well in
23 advance of the final pretrial, but hopefully,
24 aspirationally, with the idea that we would continue
25 to narrow the issues given the opportunity to continue

1 to discuss them.

2 THE COURT: Mr. McDonald.

3 MR. McDONALD: This is McDonald for Lawson.

4 I would agree to that. I suggest the 26th, Your
5 Honor, as long as that gives you enough time before
6 the 7th.

7 THE COURT: I think that's fine.

8 MR. ROBERTSON: Thank you.

9 THE COURT: Okay. All right.

10 Now, that's everything that you all have.
11 Have you all worked out an opportunity to go back and
12 talk to Judge Dohnal about resolving the case?

13 MR. ROBERTSON: It's Mr. Robertson, Your
14 Honor.

15 We're meeting with Judge Dohnal on Thursday,
16 the 19th, at 11 a.m.

17 THE COURT: All right. Mr. McDonald, they
18 may not have a damages expert, but the Court is
19 going -- there were many ways of proving damages
20 before experts were ever invented to testify about it,
21 and I haven't ruled on any of those. And also I have
22 to apply the discovery rules fairly and reasonably and
23 in accord with circuit precedence.

24 So if your client is thinking that they have
25 zero damages, your client may be under a

1 misimpression. I'm not saying that your client is
2 under an erroneous impression, but I am saying that I
3 guess the best way to put it is the opera isn't over.

4 MR. ROBERTSON: We may be speaking in terms
5 of chickens not hatching, Your Honor. I think both
6 are suitable here. We understand and, of course,
7 believe it goes both ways on all the issues in this
8 case.

9 THE COURT: Yes, it does. That's what trials
10 are ultimately about.

11 And I think that, Mr. Robertson, you-all may
12 have gotten an inflated view of life by associating
13 with Dr. Mangum, and maybe in these anti-inflationary
14 times, it's a good idea to reflect on whether you have
15 gotten inflated views of life.

16 All right. Are there any special issues on
17 the injunction part of this case that are going to
18 require any further hearing than what is already
19 established?

20 MR. ROBERTSON: Your Honor, this is
21 Mr. Robertson.

22 I think you raise a very interesting point.
23 There are certain issues that might come out that
24 should be heard outside of the purview of the jury on
25 the injunction given some of the Court's rulings.

1 You know, certainly we'd like to address all
2 of the factors that are relevant including our
3 competition, including the past history of some of the
4 settlements and the context of those that the Court
5 may not want the jury to hear any further extent.
6 Balancing the hardships.

7 I would predict, and I've been thinking about
8 this issue, that it might be a one-day hearing once
9 liability was found that would be contemplated
10 sometime after the conclusion of the trial with
11 respect to injunctive issues that should focus the
12 inquiry in the post-eBay world.

13 THE COURT: You-all are competitors, are you
14 not?

15 MR. McDONALD: Lawson had never even actually
16 heard of ePlus as a competitor for any practical
17 purpose before they got sued, Your Honor. This is
18 McDonald speaking.

19 THE COURT: Well, I guess what I'm saying is
20 that neither one of you are trolls.

21 MR. McDONALD: No. They are a business.
22 They've got this product line that's about 1 or
23 2 percent of the total of ePlus revenues, and that's
24 including products that aren't the products at issue
25 in this case even. So I guess they are not a troll

1 technically, but it's certainly not much of a part of
2 their company.

3 MR. ROBERTSON: Your Honor, this is
4 Mr. Robertson.

5 I think Mr. McDonald is making my case. I
6 think this warrants a further factual inquiry after
7 trial is over.

8 THE COURT: It might very well, and I'll deal
9 with it if and when it is comes up.

10 MR. McDONALD: Yes, Your Honor. This is
11 McDonald speaking.

12 I would agree that that's appropriate outside
13 of the jury if it's necessary, if there is a finding
14 of infringement, etc.

15 The other possibility after trial might also
16 be a decision on what an appropriate royalty, if
17 anything, would be appropriate going forward as an
18 alternative to an injunction.

19 You also see some decisions from the courts
20 encouraging the parties to try to negotiate something
21 once there is a finding of liability to see if they
22 can come to an agreement on how the situation should
23 be handled going forward.

24 So I think a few things might happen if there
25 is a finding of liability at trial.

1 THE COURT: Okay. All right. I think we're
2 all sort of mindful of the same questions then.

3 All right. Thank you all very much. Make
4 sure you come to the settlement conference with Judge
5 Dohnal with reason. And it's been a hard-fought case,
6 and I think you don't want the atmosphere of the case
7 to effect the business operations that are inevitably
8 involved in trying to reach a business settlement of a
9 business issue.

10 All right. Thank you all very much.

11 MR. ROBERTSON: Thank you.

12 THE COURT: Bye-bye.

13 (The proceedings were adjourned at 3:00 p.m.)
14

15 I, Diane J. Daffron, certify that the
16 foregoing is a true and accurate transcription of my
17 stenographic notes.

18 /s/ 8/20/10
19 _____
20 DIANE J. DAFFRON, RPR, CCR DATE
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